NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ELAINE TROSCLAIR AUTHEMENT, INDIVIDUALLY, AS ADMINISTRATRIX OF THE SUCCESSION OF CARL AUTHEMENT, JR. AND AS LEGAL TUTRIX OF THE MINOR CHILDREN, JEREMY J. AUTHEMENT, TINA C. AUTHEMENT, CARL J. AUTHEMENT, III, BRIDGETTE M. AUTHEMENT, AND HONEY L. AUTHEMENT, AND CARL J. AUTHEMENT, SR.

Petitioners,

v.

CITGO PETROLEUM CORPORATION

Respondent,

FLORIDA FUELS, INC.,

Petitioner,

v.

CITGO PETROLEUM CORPORATION,

Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's holding of "no duty" in this General Maritime Law negligence case is in conflict with this Court's ruling in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), and rulings of other courts of appeal, that a duty of reasonable care under the circumstances is uniformly owed in a General Maritime Law negligence case.

2. Should the General Maritime Law adopt the obsolete concept of "no duty", thus creating judicial immunity for dock owners who have unreasonably failed to provide safe access to their docks, or, in the alternative, should dock owners be held to a uniform duty of reasonable care under the circumstances?

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ELAINE TROSCLAIR AUTHEMENT, INDIVIDUALLY, AS ADMINISTRATRIX OF THE SUCCESSION OF CARL AUTHEMENT, JR. AND AS LEGAL TUTRIX OF THE MINOR CHILDREN, JEREMY J. AUTHEMENT, TINA C. AUTHEMENT, CARL J. AUTHEMENT, III, BRIDGETTE M. AUTHEMENT, AND HONEY L. AUTHEMENT, AND CARL J. AUTHEMENT, SR.,

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JOINT PETITION FOR WRIT OF CERTIORARI

Elaine Trosclair Authement, Individually, as Administratrix of the Succession of Carl Authement, Jr., and as Legal Tutrix of the Minor Children, Jeremy J. Authement, Tina C. Authement, Carl J. Authement, III, Bridgette M. Authement, and Honey L. Authement, and Carl J. Authement, Sr. and Florida Fuels, Inc.[1] petition for a writ

[1] There is no parent or subsidiary corporation required to be listed persuent to rule 29.1.

of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 6 F.3d 330. The district court judgment (App., *infra*, 18a) adopting the report and recommendation of the magistrate judge (App., infra, 20a) is not reported in an official reporter, but can be found at 1992 WL (Westlaw) 548367.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1993. A suggestion for rehearing en banc was timely filed in the court of appeals, but has not been ruled upon. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case arises out of the tragic death of Carl Authement, Jr. a 33 year old Jones Act seaman and sole custodial parent of five small children, who drowned on April 10, 1990 after he fell from an aluminum ladder while attempted to reboard the ocean-going barge OSPREY at dock "A" of the CITGO Petroleum ("CITGO") refinery in Westlake, Louisiana. Despite the fact that Petitioners presented clear and uncontroverted evidence that CITGO acted both unreasonably and outside of industry custom in failing to provide a safe gangway and in directing the OSPREY to the only CITGO dock which did not have a safe gangway, summary judgment was granted against Petitioners on their General Maritime Law negligence claims against

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persuent to rule 29.1.

CITGO on the ground that CITGO owed "no duty" to Carl Authement. The summary judgment was affirmed on appeal over the strong dissent of Judge W. Eugene Davis, an experienced admiralty judge. Both the district court and the court of appeals refused to apply the duty to exercise reasonable care under the circumstances recognized by this Court in *Kermarec v. Compagnie General Transatlantique*, 358 U.S. 625 (1959). In effect, CITGO has been granted what amounts to judicial immunity for its negligent acts.

Following his death, Mr. Authement's survivors, Petitioners herein, brought wrongful death and survival actions under the Jones Act, 46 U.S.C. § 688, and the General Maritime Law in Texas state court against his employer, Florida Fuels, Inc., also a Petitioner herein. The claims against Florida Fuel were settled, but the settlement did not include damages for loss of society sustained by Mr. Authement's survivors. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 122 L.Ed.2d 275 (1990) (holding that damages recoverable by seaman's survivors in general maritime wrongful death action against his employer were limited to pecuniary damages recoverable under the Jones Act). Under the terms of the settlement, Petitioners agreed to jointly pursue CITGO for recovery of all damages to which the Authements were entitled, with the recovery to be divided between the Authements and Florida Fuels.

General maritime law claims against CITGO were added to the Authement's Texas state court suit. That suit was then removed to federal court under diversity jurisdiction, 28 U.S.C. § 1332, and transferred to the United States District Court for the Western District of Louisiana, Lake Charles Division, and consolidated with a suit brought by Florida Fuels against CITGO. Extensive discovery was undertaken. CITGO then filed a motion for summary judgment, to which Petitioner's responded. The motion was

referred to a magistrate judge. Rather than applying the duty to exercise reasonable care under the circumstances which this Court established in *Kermarec* and which has been almost universally applied in maritime law to CITGO's acts and omissions, the magistrate judge found that CITGO owed no duty to Carl Authement, Jr. The apparent basis for the holding was that since the vessel owed a duty to provide safe ingress and egress to its crew, the dock did not. The district court adopted the findings of the magistrate judge and entered judgment against Petitioners on June 9, 1992.

The court of appeals affirmed the decision of the district court in a 2-1 decision. The panel majority ruled *Kermarec* inapplicable and found that no duties were owed by CITGO under general maritime law to (1) provide a safe means to go from the CITGO dock to the unmanned OSPREY or (2) assist the OSPREY in handling the docking lines. A strong dissent by Judge Eugene Davis stated that the case should have been reversed and remanded because CITGO did have a duty under *Kermarec* to exercise reasonable care in the circumstances and genuine issues of material fact existed as to whether CITGO was negligent.

The facts of this case were recited to some extent in the majority and dissenting opinions in the court of appeals. CITGO provided four docks at its facility. At three of the docks, CITGO maintained gangways and access systems which provided safe ingress and egress via handrails and solid walking surfaces to vessels using its docks. R. 146. At the other dock, the "A" dock, CITGO provided only aluminum ladders mounted on the dock which were too short to reach the deck of ocean-going barges like the OSPREY. R. 142-43, 156, 160-61, 181-82. CITGO knew before Mr. Authement's death that the OSPREY did not carry a gangway, but instead carried only an aluminum extension ladder which was known to be a dangerous means of

boarding. R. 152, 181-82. CITGO employees considered such ladders to be unsafe and CITGO had a policy of refusing to board vessels which did not carry a gangway. R. 151-52, 176-77, 183. Despite CITGO's knowledge of the dangers involved with using aluminum ladders to enter or exit a vessel, CITGO ordered the OSPREY to the only dock which did not have a safe gangway. Carl Authement, Jr's death could have been prevented by simply directing the OSPREY to any of the three available docks equipped with gangways or access systems.

The undisputed facts also show that CITGO was negligent under the circumstances in failing to provide a safe gangway to the OSPREY at dock "A". Petitioners presented uncontradicted evidence that virtually every similar dock on the Gulf Coast provides gangways to ocean-going barges like the OSPREY. It is in fact the custom of the industry for dock owners to provide gangways. R. 158-59, 186-87. CITGO itself provided safe gangways at three of its four docks. Gangways are both economically and technologically feasible for a dock owner to provide. A dock owner is in fact required by law to provide gangways for use by its own employees, 29 C.F.R. § 1918.23. Further uncontradicted evidence established that a prudent dock owner should have provided such gangways to all persons with business on the ocean-going barges which were docked at its docks. R. 186-87. Under the facts of this case, CITGO failed to act reasonably under the circumstances in not providing a safe gangway to the OSPREY and its crew.

At the time of Mr. Authement's death the OSPREY was located at the CITGO dock in order to purchase diesel fuel from CITGO. R. 109. CITGO was undeniably profiting from the presence of the OSPREY at its dock and from the work of the crew members of the TODD RICK in repositioning the OSPREY at the docks. If seamen do not

work at CITGO's docks docking and repositioning vessels, CITGO cannot sell its fuel. Petitioners have presented uncontroverted evidence that although it is unfeasible for barges such as the OSPREY to carry a gangway, it is more than feasible and is in fact the custom of the industry for dock owners such as CITGO to provide gangways to ocean-going barges. R. 161, 186-87. Obviously, if CITGO profits from the relationship it has with shipowners such as Florida Fuels, knows that it is unsafe to board vessels without a gangway, knows that the vessels do not carry gangway, and it is both technologically and economically feasible for CITGO to provide gangways, in the exercise of reasonable care CITGO should provide gangways for use by crew members of vessels calling at its docks. To hold otherwise, as the court of appeals has done in this case, completely ignores the facts of the case, the customs of the industry and the relationship of the parties.

REASONS FOR GRANTING THE PETITION

In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, (1959), this Court, acting under its broad authority over maritime law, abolished classifications and distinctions regarding the duty owed by a maritime tortfeasor to third persons in favor of a uniform rule of "reasonable care under the circumstances." The *Kermarec* opinion deliberately eschews the common law's "increasingly subtle verbal refinements;" "subclassifications among traditional common-law categories;" and, "fine gradations in the standard of care," in favor of the simple rule of exercising "reasonable care under the circumstances" to all persons lawfully aboard a vessel. This duty to exercise reasonable care has been applied in virtually every general maritime law negligence action since it was unanimously adopted by this Court. Although the court of appeals attempted to distinguish *Kermarec* by limiting its application to

shipowners, it is clear that the standard set by *Kermarec* applies equally to shipowners and non-shipowners. *See, e.g., Bubla v. Bradshaw*, 795 F.2d 349, 353 (4th Cir. 1986); *Quam v. Mobil Oil Corp.*, 496 F.Supp. 986, 988 (S.D.N.Y. 1978), *aff'd*, 599 F.2d 42 (2d Cir.), *cert. denied*, 444 U.S. 950 (1979). Even the Fifth Circuit itself has applied the duty of exercising reasonable care under the circumstances created by *Kermarec* to dock owners. *Casaceli v. Martech Intern., Inc.*, 774 F.2d 1322, 1328-29 (5th Cir. 1985).

The district court in this case found *Kermarec* to be applicable only if Plaintiffs could first establish a duty separate and apart from the duty imposed by *Kermarec*. The court of appeals, in a majority opinion which vacillates between applying maritime law and state law to Petitioner's claims[2], completely rejected the duty imposed by *Kermarec* and held that a dock owner has no duty to furnish a means of ingress or egress to a vessel regardless of the circumstances.[3]

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[2]As noted by Judge W. Davis in his dissent in the court of appeals, general maritime law clearly applies to this drowning death which occurred in a fall from a gangway. *See Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 577, 63 S.Ct. 425, 87 L.Ed.471 (1943); *Tullis v. Fidelity & Ca. Co.*, 397 F.2d 22 (5th Cir. 1968).

[3] Judge Davis' strong dissent in the court of appeals states that the *Kermarec* duty to exercise reasonable care under the circumstances applies to this case and finds that material issues of fact exist which prohibit summary judgment. Judge Davis also points out that the two cases relied upon by the majority, *Daniels v. Florida Power & Light Co.*, 317 F.2d 41 (5th Cir.), *cert. denied*, 375 U.S. 832 (1963) and *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F.Supp 913 (E.D.La. 1977), *aff'd*, 608 F.2d 522 (5th Cir. 1979), were both tried to a finder of fact who found no negligence. App., *infra*, 15a. A blanket statement of "no duty" made in *Daniels*, 317 F.2d at 42, without citation of authority, was later relied upon in *National Marine*, 433 F.Supp. at 919.

The court of appeals' decision to reject *Kermarec* and grant what, for lack of any apparent rational basis, amounts to judicial immunity to dock owners for injuries caused to seamen produces anomalous and inconsistent results. Under the majority's logic, if a seaman and barge inspector climbing a ladder from a dock to a ship are both killed, the seaman's survivors may only recover from the ship (and are presumably limited to pecuniary damages under *Miles*) because the dock owes the seaman no duty to provide ingress or egress. The inspector's survivors, however, may recover full damages, including loss of society, from both the ship and the dock because the dock owes a duty to exercise reasonable care which includes the provision of safe ingress/egress to the vessel. *Purdy v. Belcher Refining Co.*, 781 F.Supp. 1559 (S.D.Ala. 1992) (John R. Brown, J.), *aff'd*, 987 F.2d 774 (11th Cir. 1993) (dock owner who breached duty of due care in failing to provide safe ingress/egress to barge was liable to barge inspector employed by third-party contractor for injuries suffered in fall from aluminum ladder while boarding vessel). Similarly, a ship repairman working on a vessel or a diver working on a ship in a slip is owed a duty of reasonable care by a dock owner,[4] but a seaman is not.[5] Such disparate results are not supported by logic or by any reasoning set forth in the decision of the court of appeals or in the two Fifth Circuit cases upon which it relies.

The court of appeal's decision cannot be justified from either a practical or public policy standpoint. The relationship between CITGO and Florida Fuels is that of

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[4]*See Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 708 (5th Cir. 1981); *Casaceli*, 774 F.2d at 1331.

[5]Unless, of course, the action is brought in the Second Circuit. *See Quam*, 496 F.Supp. at 988.

seller and buyer. CITGO profits from the sale of its fuels to Florida Fuels. The seamen who work on Florida Fuels' vessels are necessary to dock and move the vessels so that CITGO can sell and ship its fuels. Without the seamen, CITGO would be forced to provide docking services itself. The evidence shows that it is the custom of the industry for CITGO and other similar dock owners to provide gangways to ocean-going barges at their docks. CITGO maintains such gangways at three of its four docks. It is both economically and technologically feasible for CITGO to provide gangways at its docks. It is not feasible for ocean-going barges to provide gangways due to variations in the heights and design of docks they encounter, due to the size and difficulty in moving gangways and due to the danger that the gangways stored on the unprotected barge deck would be damaged or lost in bad weather. R. at 161. Under these circumstances, the dock owner must bear a responsibility for ensuring that safe ingress and egress are provided to workers that go from ship to shore or vice versa. To hold otherwise results in exactly the same situation which this case presents - a dock owner with full knowledge of the dangers involved can direct a vessel to an unsafe dock rather than an available safe dock, fail to provided a gangway, and then pocket it profits and claim immunity from liability when a seaman is injured or killed.

The grant of judicial immunity given to dock owners by the court of appeals in this case is not supported by the case law. In other fact situations governed by general maritime law, dock owners have been held to owe a duty of reasonable care. In *Casaceli v. Martech Intern., Inc.*, 774 F.2d 1322, 1328-29 (5th Cir. 1985), the Fifth Circuit itself found that a slip owner owed a duty to exercise ordinary care to a diver who drowned while working on a boat in the slip. Likewise, in *Bubla v. Bradshaw*, 795 F.2d 349, 353 (4th Cir. 1986), a dock owner was specifically held to be subject

to the *Kermarec* duty of exercising reasonable care under the circumstances when a ship inspector was electrocuted on a vessel due to improper wiring of the dock's electricity. Relying in part on *Casaceli*, the Fourth Circuit found that the *Kermarec* duty to exercise ordinary care applied to dock owners:

> "It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." *Kermarec v. Compagnie Generale*, 358 U.S. 625, 630, 79 S.Ct. 406, 409, 3. L.Ed.2d 550 (1959). Courts have also recognized that a slip owner under admiralty jurisdiction owes a duty of ordinary care to those who use the pier. *See Casaceli v. Martech International, Inc.*, 774 F.2d 1322, 1328, 1331 (5th Cir. 1985).

> 2 Apparently adhering to it's argument that admiralty is not proper here, Hudgins Marine asserts that it owned Bubla only the duty owed a licensee, applying Virginia law. We find, however, that *Kermarec*, though considering specifically the duty of a shipowner, broadly abolished such distinction for those properly within admiralty, and that accordingly Hudgine Marine owed Bubla a duty of ordinary care.

Although the other courts of appeal have had no trouble finding that the duty to exercise reasonable care under the circumstances applies to a maritime personal injury action brought against a dock, the Fifth Circuit refuses to find that such a duty extends to a seaman. This is a complete departure from the notions of simplicity, practicality,

and uniformity which this Court sought to foster in *Kermarec*. Although this Court recognized that the common law was moving towards a "single duty of reasonable care in all the circumstances" and adopted that uniform duty for maritime law, the Fifth Circuit carves out a rule of judicial immunity for dock owners in actions brought by seamen regardless of the circumstances involved. Such a "no duty" exception has no place in general maritime law.

CONCLUSION

Petitioners ask that the Court grant certiorari in this case and reverse the judgment of the court of appeals.

Respectfully submitted,

Robert A. Chaffin

Jame A. Cobb, Jr.

FEBRUARY 1994

APPENDIX A

FLORIDA FUELS, INC. v. CITGO PETROLEUM CORP.

FLORIDA FUELS, INC., et al., Plaintiffs,

Florida Fuels, Inc., Plaintiff-Appellant,

v.

CITGO PETROLEUM CORP.,
et al., Defendants,

Citgo Petroleum Corp., Defendant-Appellee.

Elaine Trosclair AUTHEMENT, Individually
and as Administratrix & Legal Tutrix o/b/o
Honey L. Authement, etc. and Carl
J. Authement, Sr., Plaintiffs-Appellants.

v.

FLORIDA FUELS, INC.,
Defendant-Appellant,

v.

CITGO PETROLEUM CORP.,
Defendant-Appellee.

No. 92-4661

United States Court of Appeals,
Fifth Circuit.

Nov. 9, 1993.

Deceased crew member's family brought maritime tort action against vessel owner and dock owner, and dock owner removed action to federal court. Following settlement between family and vessel owner, vessel owner brought separate suit against dock owner for indemnity/contribution, and actions were consolidated. The United States District Court for the Western District of Louisiana, James T. Trimble, Jr., J., granted summary judgment for dock owner, and family and vessel owner appealed. The Court of Appeals, Bramlette, District Judge, sitting by designation, held that (1) dock owner had no legal duty to provide crew member with reasonably safe means of boarding and departing from vessel, and (2) dock owner had no duty to assist vessel owner with mooring of vessel.

Affirmed.

W. Eugene Davis, Circuit Judge, filed dissenting opinion.

1. **Admiralty** **1.20(1)**

For purposes of determining applicability of state or federal maritime law, piers and docks are deemed "extensions of land," while means of access between dock and vessel is considered "appurtenance" of vessel.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Shipping** **80**

Vessel owner's duty to provide reasonable safe means of access arises from doctrine of "seaworthiness."

See publication Words and Phrases for other judicial constructions and definitions.

3. **Seamen 9**

Under general maritime law, vessel owner has absolute nondelegable duty to provide seaworthy vessel to crew members.

4. **Admiralty 1.20(5)**

Absent maritime status between parties, dock owner's duty to crew members of vessel using dock is defined by application of state law, not maritime law.

5. **Wharves 21**

Under Louisiana law, duty owed by dock owner to invitee such as vessel crew member is duty to provide wharf or dock which is reasonable safe. LSA-C.C. art. 2317.

6. **Wharves 21**

Dock owner had no legal duty to provide vessel crew member with reasonably safe means of boarding and departing from vessel, even though dock owner furnished means of access to vessels at some of its docks.

7. **Admiralty 1.20(5)**

Question of whether dock owner had legal duty to provide vessel crew member with reasonably safe means of boarding and departing from vessel was to be decided by maritime tort law.

8. **Negligence** 1

Proper standard to be applied in maritime tort cases is "legal cause," elements of which are negligence, causal connection between negligence and injury, invasion of legally protected interest, and lack of countervailing legally protected interest as defense to liability; "legally protected interest" encompasses concept of duty.

See publication Words and Phrases for other judicial constructions and definitions.

9. **Negligence** 5

Although custom may be considered as evidence bearing on question of negligence once duty is found to exist, custom itself does not create duty; custom may help define standard of care party must exercise after it has undertaken duty, but custom alone cannot create legal relationship between parties.

10. **Wharves** 21

There is no duty imposed by maritime law on dock owner to provide means of access to vessel for vessel's crew members.

11. **Wharves** 21

Dock owner had no duty to assist vessel owner with mooring of vessel; dock owner's failure to provide line handlers to assist in mooring was not valid basis for liability.

Appeal from the United States District Court for the Western District of Louisiana.

Before JOLLY and DAVIS, Circuit Judges, and BRAMLETTE,[1] District Judge.

BRAMLETTE, District Judge:

Plaintiff-Appellants, deceased crew member's family and vessel owner, appeal the lower court's grant of summary judgment in favor of dock owner. The lower court found that the dock owner owed no duty to the vessel crew member to provide a means of access between the dock and the vessel, and owed no duty to aid in the mooring of the vessel. We affirm.

On April 10, 1990, the barge OSPREY, assisted by the tugboat TODD RICK, both owned and operated by Florida Fuels, Inc. (Florida Fuels), berthed at a dock owned and operated by Citgo Petroleum Corp. (Citgo), in order to pick up fuel. On board the TODD RICK was Carl Authement, Jr. (Authement), employed by Florida Fuels as a deckhand. The Citgo facility consisted of four docks: "A", "B","C", and "D." After the OSPREY arrived at Dock D, Citgo requested that the barge be brought to Dock A for loading the fuel.

Dock D was equipped with a walkway ingress/egress system. Dock A had no such system. There were aluminum ladders attached to Dock A on a pivot, but these were too short to serve as a means of ingress and egress between the

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1. District Judge of the Southern District of Mississippi, sitting by designation.

dock and the OSPREY. The OSPREY had its own aluminum extension ladder, which was used by the TODD RICK crew members as they moored the barge to the dock.

After the OSPREY moved to Dock A, another barge arrived at the facility, and Citgo asked that the OSPREY be moved to the north end of Dock A. After this was done, Citgo again requested the OSPREY to move, this time some fifty feet further down Dock A. At this point, Authement left the deck of the OSPREY, using the aluminum extension ladder, and proceeded to the dock to help secure the barge to the dock. After the barge was secured, Authement was ascending the ladder to return to the deck of the barge when he fell, struck his head on the pier, and drowned.

Authement's parents and his five minor children filed a maritime tort action against Florida Fuels, and later amended their petition to add Citgo as a defendant. Citgo removed the action to federal court. Florida Fuels and the Authements then reached a settlement, but the settlement did not include damages for loss of society sustained by family members. The Authements and Florida Fuels agreed to pursue Citgo jointly for the recovery of the remainder of damages sustained, and agreed to share equally any recovery made. Florida Fuels filed a separate suit against Citgo for indemnity/contribution, and on motion of Citgo the actions were consolidated.

Citgo filed a motion for summary judgment on January 24, 1992. The magistrate judge recommended that summary judgment be granted. After objections were filed, the district court reviewed the matter *de novo* and reached the same conclusion. On June 9, 1992, summary judgment was granted in favor of Citgo, adopting the magistrate judge's report and recommendation. Florida Fuels and the Authements appeal. The issues on appeal are the same that

were before the lower court on the motion for summary judgment: (1) Did Citgo owe a duty to Authement to provide a means of access between the dock and the vessel; and (2) Did Citgo owe a duty to aid in the mooring of the vessel?

"We review a district court's grant of summary judgment *de novo*, resolving any disputed issues in favor of the non-movant, to determine whether the record, as it exists, shows that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Palmer v. Fayard Moving & Transp., Corp.*, 930 F.2d 437, 438 (5th Cir. 1991). We also independently review the district court's conclusions of law. *Brister v. A.W.I., Inc.*, 946 F.2d 350, 354 (5th Cir. 1991).

1.

[1] This case involves an intersection between state and federal law. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 207. 92 S.Ct. 418, 422, 30 L.Ed.2d 383 (1971), the Supreme Court observed that, traditionally, "[t]he gangplank has served as a rough dividing line between the state and maritime regimes." Piers and docks are deemed extensions of land, *id.*, 404 U.S. at 206-07, 92 S.Ct. at 422, while the means of access between a dock and a vessel is considered an "appurtenance" of the vessel. *Romero Reyes v. Marine Enterprises, Inc.*, 494 F.2d 866 (1st Cir. 1974).

It is well-established that maritime law encompasses the gangway. *The Admiral Peoples*, 295 U.S. 649, 55 S.Ct. 885, 79 L.ED. 1633 (1985); *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471 (1943); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed.

1086 (1917); *Tullis v. Fidelity & Cas. Co.*, 397 F.2d 22 (5th Cir. 1968); *O'Keeffe v. Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir. 1965).

It is also well-established that a vessel owner has a "fundamental duty" to provide its crew members with a reasonably safe means of boarding and departing from the vessel. *Mussey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679 (5th Cir. 1969); *cert. denied*, 396 U.S. 1037, 90 S.Ct. 682, 24 L.Ed.2d 681 (1970); *Superior Oil Co. v. Trahan*, 322 F.2d 234, 235 (5th Cir. 1963). The question posed in the present case is whether a dock owner has a similar duty to crew members of a vessel using its facility.

[2,3] The vessel owner's duty to provide a reasonably safe means of access arises from the doctrine of "seaworthiness." Under general maritime law, a vessel owner has "an absolute nondelegable duty to provide a seaworthy vessel" to crew members. *Brister v. A.W.I. Inc.*, 946 F.2d 350, 355 (5th Cir. 1991). Unseaworthiness is "predicated without regard to fault or the use of due care." *Id.*, quoting *Lee v. Pacific Far East Line, Inc.*, 566 F.2d 65, 67 (9th Cir. 1977). It is wellsettled, however, that the doctrine of "seaworthiness" is not applicable to a dock owner who does not occupy the position of owner or operator of the vessel. *Daniels v. Florida Power & Light Company*, 317 F.2d 41, 44 (5th Cir.), *cert. denied*, 375 U.S. 832, 84 S.Ct. 78, 11 L.Ed.2d 63 (1963); *Baker v. Raymond International, Inc.*, 656 F.2d 173, 181 (5th Cir. 1981), *cert. denied*, 456 U.S. 983, 102 S.Ct. 2256, 72 L.Ed.2d 861 (1982).

[4,5] Absent a maritime status between the parties, a dock owner's duty to crew members of a vessel using the dock is defined by the application of state law, not maritime law. *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727, 730 (6th Cir.), *cert. denied*, 382 U.S. 812, 86

S.Ct. 28, 15 L.Ed.2d 60 (1965). In the present case, there was no maritime status between Citgo and Authement. Louisiana law defines the duty Citgo owes an invitee such as Authement as the duty to provide a wharf or dock which is reasonably safe. *Sons v. New Amsterdam Casualty Company*, 186 So.2d 375, 376 (La.Civ.Code Ann. art. 2317 (West 1979), provides, in relevant part, that "[w]e are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." *See Gauthier v. Crosby Marine Service, Inc.* 752 F.2d 1085, 1088 (5th Cir. 1985).

[6] The appellants do not contend that the accident was caused by some substance on the surface of the dock, or by some defect in the dock itself; nor do they contend that the accident was caused by a person for whom Citgo was answerable or that the ladder was in Citgo's custody. Instead, they urge this Court to find that Citgo had a legal duty to provide Authement with a reasonably safe means of boarding and departing from the OSPREY.

[7,8] The question of whether such a duty exists is to be decided by maritime tort law. In this circuit, the proper standard to be applied in maritime tort cases is "legal cause." *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 222-23 (5th Cir. 1976). The elements of legal cause are negligence, a causal connection between the negligence and the injury, the invasion of a legally protected interest, and lack of a countervailing legally protected interest as a defense to liability. Restatement 2d Torts § 9. "Legally protected interest" encompasses the concept of duty. *Chavez v. Noble Drilling Corp.*, 567 F.2d 287, 289 (5th Cir. 1978).

"The doctrine of *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), that an actor is not

answerable in tort to a person to whom he owed no duty, was adopted in admiralty in *Sinram v. Pennsylvania R. Co.*, 61 F.2d 767, 770 (2d Cir. 1932)." *Spinks*, 507 F.2d at 222, n. 8. "Whether a defendant owes a plaintiff a legal duty is a question of law. Whether a defendant has breached a duty owed is a question of fact." *Chavez*, 567 F.2d at 289.

The appellants ask us to apply the general duty to exercise "reasonable care under the circumstances," citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 8 L.Ed.2d 550 (1959). *Kermarec* involved an injury to a guest of a member of a ship's crew, which occurred when the guest was descending a stairway in order to leave the ship. The Supreme Court applied the "settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." However, *Kermarec* does not extend, even by implication, such a duty to a dock owner toward a vessel crew member aboard the vessel or an appurtenance thereto. Furthermore, *Kermarec* was the law when this Court decided *Daniels, supra*, on the basis that "[t]here was no duty on [the dock owner] to supply a ladder in the first place."

Other cases upon which the appellants rely are likewise inapposite. *Bailey v. Texas Co.*, 47 F.2d 153 (2d Cir. 1931); *Sims v. Chesapeake & Ohio Railway Co.*, 520 F.2d 556 (6th Cir. 1975); and *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361 (6th Cir.), *cert. denied*, 479 U.S. 849, 107 S.Ct. 173, 93 L.Ed.2d 109 (1986), all involved unsafe conditions on the dock itself. In *Purdy v. Belcher Refining Co.*, 781 F.Supp. 1559 (S.D. Ala. 1992), which did involve an accident on a ladder between the dock and a vessel, the plaintiff was not a vessel crew member, but was instead a petroleum inspector and employee of W.S. Seybolt and Company, an independent contractor. The district court was

careful to point out that "[t]his case does not involve the access to the oil dock by a member of the crew of a vessel or tugboat. Here, the presence of the Seybolt inspector to determine quantity and specification of the oil was a matter in which Belcher [the dock owner] had a direct, significant and commercial interest in the sale and transportation of its products." *Id.* at 1561.

[9] The appellants also urge us to find that Citgo's customary practice of providing means of access at some of its docks creates a duty in this case. It is undisputed that many dock owners provide gangways or other means of access for their own employees, as they are required to do by the OSHA regulations for longshoring, 29 C.F.R. § 1918.1 et seq. (1992). Nonetheless, although custom may be considered as evidence bearing on the question of negligence once a duty is found to exist, custom itself does not create the duty. Custom may help define the standard of care a party must exercise after it has undertaken a duty, but custom alone cannot create a legal relationship between the parties. In this case, the fact that Citgo furnished means of access to vessels at some of its docks does not create a legal duty on the part of Citgo to provide a means of access for the OSPREY's crew members.

Citgo is not without duties to the owner and crew members of a vessel using its dock, but its duties do not include furnishing a means of access to a vessel for its crew members. In *National Marine Service, Inc. v. Gulf Oil Company*, 433 F.Supp. 913 (E.D.La. 1977), *aff'd without op.*, 608 F.2d 522 (5th Cir. 1979), a seaman was injured while going from his vessel to a dock using a ladder furnished by the vessel owner. As in the present case, the vessel owner and the wharfinger were sued, and the vessel owner filed a cross claim against the wharfinger for indemnification. The district court cited *Sims* which holds

that, for indemnification purposes, a vessel owner can look to the implied warranty of workmanlike service which a wharfinger owes a shipowner.

> The nature of the services performed by the wharfinger determines the extent of this warranty .... The implied warranties of a wharfinger relate to the conditions of berths and the removal of dangerous obstructions or giving notice of their existence to vessels about to use the berths .... A wharfinger also owes a duty to furnish a safe means of egress and ingress to berthed ships.

Sims, 520 F.2d at 561, as quoted in *National Marine*, 433 F.Supp. at 918.

In *National Marine*, the vessel owner sought to recover damages for the dock owner's "failure to provide a gangway or some safer means of access than the vessel itself supplied." *Id.* However, the district court, following *Daniels*, found that even under the implied warranty of workmanlike performance, a dock owner does not owe a vessel or its crew members a duty to provide a means of access between the dock and the vessel. The court pointed out that the duty to furnish a safe means of egress and ingress to berthed ships refers to passage over the dock itself, not the means of access connecting the dock to the vessel. *Id.*

[10] There is no duty imposed by maritime law on a dock owner to provide a means of access to a vessel for the vessel's crew members. *Daniels*, 317 F.2d at 42. The only duty, established by Louisiana law in this case, is to provide a dock which is reasonable safe. The appellants would have us reverse the district court on the grounds that since there

was a duty, the court should have let the breach of duty issue go to the trier of fact. We find, however, that in this case there is no genuine issue of material fact. The circumstances surrounding the accident are not in dispute. There was no defect in or on the dock itself, nor was the ladder furnished by the dock owner or under its control. These undisputed facts allow us to find as a matter of law that Citgo did not breach its duty to maintain a reasonable safe premises.

Despite arguments of the appellants to the contrary, we find that for purposes of this case the relationship among dock owners, vessel owners and seamen is virtually the same as it was in 1963 when this court heard *Daniels*. That case still constitutes the law of this circuit, and we are not persuaded that it should be otherwise.

2.

[11] The appellants contend that Citgo had a duty to assist Florida Fuels with the mooring of its vessel, and that its failure to do so caused Authement's accident on the theory that he would not have otherwise disembarked. Without addressing the second part of this argument, we find that Citgo owed no such duty.

In *Trade Banner Line, Inc. v. Caribbean S.S. Co., S.A.*, 521 F.2d 229, 230 (5th Cir. 1975), this Court discussed a wharfinger's "duty to exercise reasonable diligence to furnish a safe berth." The Court found that it "includes the duty to ascertain the condition of the berth, to make it safe or warn the ship of any hidden hazard or deficiency known to the wharfinger or which, in the exercise of reasonable care and inspection, should be known to him and not reasonable known to the shipowner." *Id.* The Court further found that "it is the master, when present and supervising, and not a wharfinger — absent some type of

contractual commitment not present here—who is responsible for the mooring of a ship." *Id.* at 231. Similarly, "[t]he implied warranties of a wharfinger relate to the conditions of berths and the removal of dangerous obstructions or giving notice of their existence to vessels about to use the berths." *Sims*, 520 F.2d at 561.

There was no duty on the part of Citgo to assist in the mooring of the OSPREY. As a matter of law, Citgo's failure to provide line handlers to assist in mooring cannot be a valid basis for liability under the facts of this case.

The judgment of the district court is AFFIRMED.

W. EUGENE DAVIS, Circuit Judge, dissenting.

Because I would vacate the district court's dismissal and remand this case for trial, I respectfully dissent.

The majority, relying on *Daniels v. Florida Power & Light Co.*, 317 F.2d 41 (5th Cir. 1963) and *National Maritime Service Inc. v. Gulf Oil Co.*, 433 F.Supp. 913, 919 (E.D.La. 1977), concludes that regardless of the facts in any particular case a wharfowner never owes a duty to a crewmember of a vessel to provide safe access from the vessel to the wharf. The majority reads too much into those cases.

In *Daniels*, a dock engineer fell off a ladder while climbing from his barge to a dock; the distance between the barge and the dock was three feet; the ladder led upward from the barge to the dock at an angle of 15 to 20 degrees; the ladder was owned by the dock owner, but put in use by barge employees. Following a trial on the merits, the trier of fact concluded that the wharfowner was not negligent, and we affirmed, saying:

> There was nothing inherently dangerous about the ladder. It was not put in use by Florida Power. There was no duty on Florida Power to supply a ladder in the first place. Even if it be argued that customary use with knowledge of Florida Power imposed some duty, our attention is not called to any theory whereunder a duty was imposed on Florida Power under these facts to supply a ladder that would not slip or one with handrails on it. Furthermore, appellants had used the ladder many times before, and even on the night of the accident; and such risk or danger, if any, as attached to the use of the ladder was so reasonably apparent as to be a bar under the circumstances.

In *National Marine*, a tug crew member fell as he attempted to walk across his employer's ladder to get from a barge to the defendant's wharf. The barge was level with the dock and the ladder horizontal. Denying the vessel owner's claim for contribution or indemnity against the dock owner, the trier of fact concluded that the dock owner was not negligent. *National Marine*, 433 F.Supp. at 920. In both *Daniels* and *National Marine*, judgment was rendered after a full trial and after the district court found no negligence on the part of the dock owner.

Injuries occurring on gangplanks between a vessel and a wharf are considered maritime torts and are governed by the general maritime law. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 577, 63 S.Ct. 425, 87 L.Ed. 471 (1943); *Tullis v. Fidelity & Ca. Co.*, 397 F.2d 22 (5th Cir. 1968). Thus a wharfowner owes a seaman, like any other business invitee on his property, the duty to "exercise reasonable care in all the circumstances." *Compagnie Generale Transatlantique v.*

Kermarec, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959); *Casaceli v. Martech Intern., Inc.*, 774 F.2d 1322, 1328-29 (5th Cir. 1985); *Bubla v. Bradshaw*, 795 F.2d 349, 358 (4th Cir. 1986); *Quam v. Mobile Oil*, 496 F.Supp. 986, 988 (S.D.N.Y. 1978), *aff'd*, 599 F.2d 42 (2d Cir.), *cert. denied*, 444 U.S. 950, 100 S.Ct. 428, 62 L.Ed.2d 321.

Whether, in the exercise of reasonable care, a wharfowner is responsible for furnishing a gangplank or other means of access from the vessel to the wharf depends upon the facts and circumstances of each case. Frequently, the wharfowner is purely passive and does nothing more than provide a location for the vessel to land and take on or discharge cargo. In such a case, the wharfowner does not undertake to provide a gangplank because everyone assumes the vessel will provide its crew with adequate means of egress and ingress. In such a case, the vessel is solely responsible for providing an inadequate gangway.

But that does not mean the wharfowner, in the exercise of reasonable care, *never* is at fault for failing to furnish a gangplank or other access to the wharf. Based on the summary judgment evidence presented in this case, plaintiff presented a genuine issue of material fact regarding the wharfowner's negligence in failing to provide a gangplank.

According to the summary judgment evidence, the barge OSPREY called regularly at the Citgo refinery. At the dock where the barge was usually loaded (dock D), Citgo had a safe gangway available for the crew to use. Citgo knew that the barge OSPREY carried no gangway. Citgo directed the barge OSPREY to Dock "A", which had no ingress/egress system. This was done for Citgo's convenience, to better enable it to handle other ships. Because it had called to load fuel, the barge OSPREY was

riding high when it approached the dock; the distance from the dock to the barge's deck exceeded twenty feet. A factfinder could conclude that by failing to provide a gangway for the barge OSPREY, Citgo deviated from its established custom and practice of providing a gangway to this vessel and similar vessels. Under these circumstances, a factfinder could conclude that Citgo was negligent in directing this vessel to dock D where no gangway was provided when it knew the barge in reliance on an established custom did not have a means of access to the dock.

For the reasons stated above, I would vacate the summary judgment and remand this case for trial.

APPENDIX B

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
JUN - 9 1992
ROBERT H. SHEMWELL, CLERK
BY /s/ ln
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

ELAINE TROSCLAIR	:	
AUTHEMENT, ETC.,	:	CIVIL ACTION NO.
ET AL	:	91-0973-LC
	:	CONSOLIDATED WITH
VS.	:	CIVIL ACTION NO.
	:	91-1514-LC
FLORIDA FUELS,INC.	:	JUDGE TRIMBLE
and CITGO	:	MAGISTRATE
PETROLEUM	:	JUDGE WILSON
CORPORATION	:	

J U D G M E N T

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein and after an independent review of the record including the objections filed therein, and a *de novo* determination of the issues, and having determined that the findings are correct under the applicable law:

IT IS ORDERED that the motion for summary judgment on behalf of Citgo Petroleum Corporation be and the same is hereby GRANTED dismissing plaintiffs' claims with prejudice.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 9th day of June , 1992.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 6-11-92
BY cag
TO: Emmett
Cobb
Miller
Chaffin
Massey

APPENDIX C

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
MAY 19 1992
ROBERT H. SHEMWELL,CLERK
BY /s/ In
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

ELAINE TROSCLAIR	:	
AUTHEMENT, ETC.,	:	CIVIL ACTION NO.
ET AL	:	91-0973-LC
	:	CONSOLIDATED WITH
VS.	:	CIVIL ACTION NO.
	:	91-1514-LC
FLORIDA FUELS, INC.	:	JUDGE TRIMBLE
and CITGO	:	MAGISTRATE JUDGE
PETROLEUM	:	WILSON
CORPORATION	:	

REPORT AND RECOMMENDATION

These consolidated matters are before the court on a motion for summary judgment filed by Citgo Petroleum Corporation (Citgo). This motion has been referred to the undersigned Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. §636(b)(1)(B).

These actions arise out of the tragic death of Carl Authement, Jr. Civil Action No. 91-1514-LC was brought by the decedent's surviving parents and children. Civil

Action No. 92-0973-LC was brought by decedent's employer, Florida Fuels, Inc. (Florida Fuels), seeking indemnification or contribution.

On April 10, 1990 a barge owned and operated by Florida Fuels, the OSPREY, berthed at a dock owned and operated by Citgo, "A" dock. The OSPREY had berthed and loaded at "A" dock on at least 2 previous occasions in 1990. In order to secure the OSPREY to "A" dock it was necessary for the decedent to gain access to the dock. There were aluminum ladders attached to the dock on a pivot but these could not be used as a means of egress and ingress between the dock and the OSPREY because they were too short. However, there was an aluminum extension ladder on the OSPREY which was utilized by the decedent to reach the dock. After the Osprey was secured to "A" dock the decedent began to climb the ladder back onto the OSPREY. He slipped and fell onto the dock and then into the water where he drowned.

The decedent's survivors have settled their claims against Florida Fuels. It is alleged that the claims were settled for less than full value due to the decision of *Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990) (survivors of Jones Act seaman may not recover for loss of society). As part of the settlement Florida Fuels and decedent's survivors agreed to jointly pursue claims against Citgo and to share equally in any recovery.

Plaintiffs primarily contend that Citgo is liable to them because Citgo did not provide a safe means of ingress and egress between the OSPREY and the dock. Plaintiffs have also alleged that Citgo was negligent in failing to provide line handlers to assist in mooring the OSPREY.

Finding that no liability exists under the circumstances of this case as a matter of law, this court concludes that Citgo is entitled to a summary judgment dismissing plaintiffs' claims.

Duty to Provide Safe Means of Ingress and Egress Between Dock and Barge

In *Daniels v. Florida Power & Light Co.*, 317 F.2d 41 (5th Cir. 1963) *cert. den.* 84 S.Ct. 78 (1963), the court denied recovery under facts more favorable to the plaintiffs than the facts in the present case. In *Daniels* a tug and barge had berthed at a dock owned and operated by Florida Power and Light. "A *ladder owned by Florida Power and Light*, and usually found on the dock, *was customarily used* to span the three foot space between the dock and the barge." 317 F.2d at 42 (emphasis supplied). The tug's captain was using the ladder to go onto the dock when he lost his balance and fell into the water. Plaintiffs contended that maritime law imposed liability on the owner and supplier of a defective gangplank for injuries sustained by a business invitee using the gangplank in a foreseeable and authorized manner. In rejecting liability on the part of Florida Power and Light, the court stated in part:

> "*There was no duty on Florida Power to supply a ladder in the first place.* Even if it be argued that customary use with knowledge of Florida Power imposed some duty, our attention is not called to any theory whereunder a duty was imposed on Florida Power under these facts to supply a ladder that would not slip or one with handrails on it. Furthermore, appellants had used the ladder many times before, and even on the night of the accident; and such risk or danger, if any, as attached to the use of the ladder was so

reasonably apparent as to be a bar under the circumstances." 317 F.2d at 42-43 (emphasis supplied).[1]

The facts in *National Marine Service, Inc. V. Gulf Oil Co.*, 433 F.Supp. 913 (E.D. La. 1977) affd. without op., 608 F.2d 522 (5th Cir. 1979) were remarkably similar to the facts in the present case. Hess Pipeline Company (Hess) operated both a barge dock and ship dock for loading vessels. National Marine Service, Inc.'s (National) vessel brought a tow of 3 barges to Hess's facility. They docked at the ship dock to avoid having to break the tow. The dock was constructed so that dolphins separated the dock from any vessel moored to it. Additionally, when the barges were empty they rode several feet above the dock.

The Hess dock had no gangway. This fact was known to the vessel's master who had complained to Hess about the lack of a gangway. The National vessel carried a 10-12' straight ladder to be used by personnel in moving between the dock and the vessel. Cross was a member of the crew of the vessel. He was injured while going from the moored barge to the dock on the ladder. National settled with Cross and sought indemnity or contribution from Hess.

In addressing the indemnity claim the court acknowledged that the wharfinger owed vessels docked at its wharves an implied warranty of workmanlike performance. This includes the duty to "furnish a safe means of egress and ingress to berthed ships." *Sims v. Chesapeake & O.R. Co.*, 520 F.2d 556, 561 (6th Cir. 1975). The court in *National Marine* was careful to point out that this duty applied to the dock and not to the means of access between the dock and

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1. *See also Bunge Corp. V. M/V FURNESS BRIDGE*, 558 F.2d 790 (5th Cir. 1977) *cert. den.* 98 S.Ct. 1488 (1978).

the vessel. Relying on *Daniels*, the court concluded indemnity was not available. It also noted that, unlike *Daniels*, the means of access had been provided by the vessel.

The court also rejected the claim for contribution stating:

> "Both National and Cross were aware that Hess provided no gangway or ladder. The risk was open and obvious. National undertook to furnish the ladder. National has no right of contribution from Hess both because Hess breached no duty owed to Cross, and because, in any event, the duty was caused by the fault of National." 433 F.Supp. at 920.

In the case *sub judice* plaintiffs are unable to cite any authority from the Fifth Circuit to distinguish *Daniels* and *National Marine*. The cases cited by plaintiffs do not establish a duty on a wharfinger to provide access from the dock to the vessel. *Sims v. Chesapeake & Ohio Railway Co.*, *supra*; *Bailey v. Texas Co.*, 47 F.2d 153 (2d Cir. 1931); and *Oglebay Norton Co. V. CSX Corp.*, 788 F.2d 361 (6th Cir. 1986), *cert. den.* 107 S.Ct. 173 (1986) involved unsafe conditions on the dock itself. While plaintiffs have been unable to cite authority imposing a duty on the wharfinger to provide crew members access between the dock and the vessel there are numerous cases establishing such an obligation on the seaman's employer. 8 ALR.3d 505, *Buckner v. State Boat Operators*, 680 F.Supp. 239 (E.D. La. 1988).

Plaintiffs' primary contention appears to be that *Daniels* and *National Marine* do not require a summary

judgment in favor of Citgo in this case because here there is a genuine issue of material fact. The issue of fact is whether or not there is a custom or practice of dock operators providing gangways for access between docks and vessels.[2] The question of whether Citgo owed a legal duty to the decedent or to Florida Fuels to provide a means of access between the dock and the OSPREY is a question of law. If there was such a legal duty the standard of conduct required to satisfy the duty would be one of reasonable care under the circumstances.[3] Custom or practice is relevant to establish whether a defendant's conduct is reasonable under the circumstances.[4] However, custom or practice is not an issue of fact material to the question of law -- did this defendant owe Florida Fuels or the decedent a duty to provide access between the barge and the dock.[5] There was no such duty.

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2. It would not be surprising if docks normally had such gangways in view of OSHA regulations that impose an obligation on wharfingers to provide such devices to their employees. 29 C.F.R. §1918.23. However, these regulations do not establish duties in favor of vessels or vessel personnel. *National Marine Service, Inc. v. Gulf Oil, supra* at 919.

3. *Kermarec v. Compagnie Generale Transatlantique*, 79 S.Ct. 406 (1959).

4. *Loehr v. Offshore Logistics, Inc.*, 691 F.2d 758 (5th Cir. 1982).

5. "It is better to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation. In other words, 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same-- to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty . . . ." W. Keeton, Prosser & Keeton, on the Law of Torts at p. 356 (5th ed. 1984).

Daniels v. Florida Power & Light Co., supra; *National Marine Service, Inc. v. Gulf Oil Co., supra.*

Plaintiffs reliance on *Scindia Steam Navigation Co. V. De Los Santos*, 101 S.Ct. 1614 (1981) is also misplaced. *Scindia* did not extend a vessel owner's responsibility beyond the vessel and its equipment. By analogy it cannot be used to extend the wharfinger's responsibility beyond the dock to the means of access provided by the vessel.

Duty to Aid in Mooring

Plaintiffs also contend that Citgo is legally responsible for Mr. Authement's death because Citgo failed to provide line handlers to assist in mooring the OSPREY. Plaintiffs have cited no authority specifically holding that a wharfinger has a legal obligation to provide line handlers under the circumstances alleged to be present in this case.

In *Trade Banner Line, Inc. v. Caribbean S.S. Co.*, S.A. 521 F.2d 229 (5th Cir. 1975) the court noted:

> ". . . . . [I]t is the master, when present and supervising, and not a wharfinger -- absent some type of contractual commitment not present here -- who is responsible for the mooring of a ship." 521 F.2d at 231.

Citgo's failure to provide line handlers to assist in mooring the OSPREY is not a valid basis for liability in this case as a matter of law.

Accordingly, it is recommended that Citgo's motion for summary judgment be granted and that plaintiffs' claims be dismissed with prejudice.

Under the provisions of 28 U.S.C. 636(b) (1) (C) the parties have ten (10) business days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE WILL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDS ON APPEAL.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 19th day of May, 1992.

/s/ Alonzo P. Wilson
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

COPY SENT
DATE 5-19-92
BY /s/ IN
TO: Miller
Cobb
Emmett
Massey
Chaffin

Supreme Court, U.S.
FILED
MAR 11 1994
OFFICE OF THE CLERK

No. 93-1312

In The

Supreme Court of the United States

October Term, 1993

ELAINE TROSCLAIR AUTHEMENT, INDIVIDUALLY, AS ADMINISTRATRIX OF THE SUCCESSION OF CARL AUTHEMENT, JR. AND AS LEGAL TUTRIX OF THE MINOR CHILDREN, JEREMY J. AUTHEMENT, TINA C. AUTHEMENT, CARL J. AUTHEMENT, III, BRIDGETTE M. AUTHEMENT, AND HONEY L. AUTHEMENT, AND CARL J. AUTHEMENT, SR.,

Petitioners,

v.

CITGO PETROLEUM CORPORATION,

Respondent.

FLORIDA FUELS, INC.,

Petitioner,

v.

CITGO PETROLEUM CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO JOINT PETITION FOR WRIT OF CERTIORARI

GREGORY P. MASSEY
Attorney at Law
1301 Common Street
P.O. Box 3148
Lake Charles, LA 70602
(318) 439-2774

Attorney for Respondent,
CITGO Petroleum Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Does the Fifth Circuit's decision in this case conflict with this court's ruling in *Kermarec v. Compagnie Generale TransAtlantique,* 358 U.S. 625 (1959)?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

In accordance with Rule 29.1 of the Supreme Court Rules, CITGO Petroleum Corporation files this list of parent companies and non-wholly owned subsidiary companies:

PARENT COMPANIES – CITGO's immediate parent is PDV America, Inc. whose immediate parent is Propernyn, whose immediate parent is Venedu, whose immediate parent is Petroleos de Venezuela, S.A.

NON-WHOLLY OWNED SUBSIDIARIES – Badger Pipe Line, Cit-Con Oil Corporation, CITGO Asphalt Refining Company, Colonial Pipeline Company, East Texas Mainline, Explorer Pipeline Company, Kaw Pipe Line, Lake Charles Pipeline, Lyondell-CITGO Refining Company, LTD., Mesa Pipeline Company, Mt. Vernon Phenol Company, Nelson Industrial Steam Company, Providence Terminal Association II, Texas Phenol Plant, Texas-New Mexico Pipe Line, Thyssen CITGO Petcoke Corporation, United Auto Service Corp., West Shore Pipe Line, West Texas Gulf Pipe and Wolverine Pipe Line.

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No. 93-1312

In The

Supreme Court of the United States

October Term, 1993

ELAINE TROSCLAIR AUTHEMENT, INDIVIDUALLY, AS ADMINISTRATRIX OF THE SUCCESSION OF CARL AUTHEMENT, JR. AND AS LEGAL TUTRIX OF THE MINOR CHILDREN, JEREMY J. AUTHEMENT, TINA C. AUTHEMENT, CARL J. AUTHEMENT, III, BRIDGETTE M. AUTHEMENT, AND HONEY L. AUTHEMENT, AND CARL J. AUTHEMENT, SR.,

Petitioners,

v.

CITGO PETROLEUM CORPORATION,

Respondent.

FLORIDA FUELS, INC.,

Petitioner,

v.

CITGO PETROLEUM CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO JOINT PETITION FOR WRIT OF CERTIORARI

CITGO Petroleum Corporation (CITGO) files this, its Brief In Opposition to Joint Petition for Writ of Certiorari.

CITGO respectfully urges this Court not to exercise its discretion by granting the writ because joint petitioners have not set forth valid reasons for the issuance of the writ in accordance with Rule 10.1 of the Supreme Court Rules.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1993. A suggestion for rehearing en banc was denied on February 10, 1994. The jurisdiction of this court was evoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On April 10, 1990, Carl Joseph Authement, Jr. was killed as a direct result of the gross negligence of his Jones Act employer and the unseaworthiness of the M/V Todd Rick and the barge Osprey, both vessels owned by Mr. Authement's employer. Mr. Authement was employed by Florida Fuels, Inc., petitioner herein, as a deckhand. CITGO Petroleum Corporation, respondent herein, is involved in this case only because the tragic accident happened to occur adjacent to CITGO's dock in Calcasieu Parish, Louisiana.

All parties to this proceeding including Mr. Authement's survivors, Florida Fuels and CITGO agree that the cause of this accident was the employer's furnishing of a rickety old aluminum extension ladder as the sole means

of ingress and egress from the tug and tow to the various ports of call. Joint Petition For Writ of Certiorari, pp. 4-5.

The accident occurred while Mr. Authement was carrying out his assigned duties, one of which was to handle lines and assist the captain in safely mooring the vessels. After the Florida Fuels' vessels were safely moored to CITGO's dock, one of the other members of the crew of the vessel lowered the aluminum ladder to Mr. Authement so that he could gain access to the Osprey. While Mr. Authement was climbing up the ladder, he fell into the waters of the Calcasieu ship channel and drowned.

The Authement family sued Florida Fuels in Texas State Court on counts of unseaworthiness and negligence under the Jones Act, 46 U.S.C. § 688. The Authement survivors settled their Jones Act and unseaworthiness claims against Florida Fuels and reserved all rights to recover damages for loss of society against CITGO.[1] As a condition of the settlement, the Authements were obligated to pursue a negligence claim against CITGO Petroleum Corporation but if anything was recovered, the Authement survivors had to split the money fifty-fifty with Florida Fuels.

The procedural history of the case from the point of the settlement to this Joint Petition for Writ of Certiorari is correctly recited by petitioners at pages 3 and 4 of the Joint Petition. Accordingly, respondent will not repeat the details of how this case comes before the court except to

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[1] Survivors are precluded from recovering damages for loss of society under both the Jones Act and the general maritime law. *Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 498 U.S. 19 (1990).

say that the appellate history began with the granting of a summary judgment in favor of CITGO Petroleum Corporation.

SUMMARY OF THE ARGUMENT

The pretext under which this Writ of Certiorari is sought by petitioners is that the Fifth Circuit Court of Appeals and the District Court rendered a decision which allegedly conflicts with the decision of this court in *Kermarec v. Compagnie Generale TransAtlantique*, 358 U.S. 625 (1959). The Fifth Circuit decision does not conflict with *Kermarec* or any other decision of this court.

Kermarec stands for the proposition that the common law concepts of licensee and invitee, and the corresponding duty which a land owner owes to each category of persons on his premises, are not well suited to a maritime application. Hence, the court abolished the common law distinctions between licensee and invitee in the maritime context and held that the ship owner's duty to all persons lawfully on board is one of exercising reasonable care under the circumstances of each case. However, *Kermarec* specifically authorized and condoned a more onerous duty on a ship owner toward those persons in his employ, i.e. seaman. Thus, although abolishing the land based concepts of licensee and invitee, the court specifically recognized that a duty which a ship owner owes to one class of persons could be more onerous or less onerous than a duty which the same ship owner owes to another class of persons.

The Fifth Circuit decision in the instant case does not conflict with *Kermarec* in any sense of the word. Nothing in the opinion suggests that CITGO did not owe Mr. Authement a duty of exercising reasonable care under the circumstances. The Fifth Circuit simply acknowledged that the dock owner's duty to Mr. Authement in this case did not extend to furnishing him with the gangway since that duty is one from which the ship owner can never be relieved.

ARGUMENT

The only relevant facts which this court should concern itself with are:

1. The ladder being used by Mr. Authement to board the vessel was owned by Florida Fuels and the crew was instructed to use the ladder by the captain; R. 80, 100, 101;

2. There have been no suggestions in the pleadings or other documents in the record that there was anything on the dock which was unreasonably dangerous or which contributed in any way to the accident;

3. The ladder was the only means of ingress and egress provided by the vessel; R. 80, 100, 101; and

4. After the accident, Florida Fuels purchased a suitable gangway; R. 267.

None of the foregoing facts are disputed. CITGO Petroleum Corporation very simply did nothing whatsoever to cause or contribute to this tragic accident.

In determining whether CITGO's motion for summary judgment should be granted, the Magistrate Judge in the District Court focused on the duty of a dock owner because the question of duty is a question of law rather than a question of fact. In his report and recommendation, Magistrate Wilson correctly noted that custom in the industry with respect to whether dock owners normally provide gangways for boarding vessels is not material to the legal question of whether a dock owner owes a duty to a seaman to provide a safe means of ingress and egress. R. 308. If the District Court or the Court of Appeals had found that a duty existed, then the disputed fact of whether it was the custom of the industry for dock owners to provide gangways to members of the crew of vessels calling at the dock, would have been material to the determination of whether CITGO acted reasonably to Mr. Authement or in other words, whether there was a breach of duty. The determination of a breach of duty is generally a question of fact under a duty-risk analysis. *Chavez v. Noble Drilling Corp.*, 567 F.2d 287 (5th Cir., 1978).

There has never been a case which has held that a dock owner has a duty to provide a gangway to a member of a crew of a vessel calling at the dock. The dock owner's duty of due care to a seaman only extends to the dock and its appurtenances and has never been extended to apply to a ship's ladder or gangway. In fact, the law in the Fifth Circuit is clear that a dock owner does not owe a duty to provide vessel crew members with gangways. *Daniels v. Florida Power & Light Company*, 317 F.2d 41 (5th Cir., 1963) cert. den., 84 S.Ct. 78 (1963) and *National Marine Service, Inc. v. Gulf Oil Company*, 433 F. Supp. 913

(E.D. La. 1977) affd. without op., 608 F.2d 522 (5th Cir., 1979).

The reasoning of the lower court in this case is both logical and consistent with *Kermarec*. It is logical because it encourages ship owners to carry safe gangways on board in those situations in which gangways are not available at docks. If the Fifth Circuit had held that CITGO owed a duty to supply a gangway, ship owners would be less inclined to carry gangways knowing that dock owners owed such a duty to vessel crew members. The lower court decisions were consistent with *Kermerac* in that it was specifically held that dock owners owed a duty of care to persons using their dock, but the duty did not extend to supplying vessel crew members with gangways.

In this case, because of Mr. Authement's status as a seaman, he was owed on the one hand an absolute duty by the ship owner to furnish a safe gangway and a seaworthy vessel. On the other hand, the dock owner owed him a duty of reasonable care under the circumstances. The lower courts relying on valid precedent held that the duty did not extend to supplying him with a gangway. The difference in the duty owed by the two alleged tortfeasors, CITGO and Florida Fuelds, is based on status, a distinction which *Kermerac* specifically recognized.

Petitioners' reliance on *Kermarec* is misplaced. In *Kermarec*, the plaintiff was invited aboard a ship by the captain and was injured on a ship's stairway as the result of a defective stair step. The District Court applied out

dated concepts of "licensee" and "invitee" to the standard of care which the ship owner owed to the visiting plaintiff. The issue facing this court was whether admiralty recognizes the same distinctions between an invitee and a licensee as in common law.

Finding that the common law distinctions between licensees and invitees were foreign to the law of admiralty, this court held as follows:

> "We hold that the owner of a ship in navigable water owes to all who are on board for purposes not inimical to his legitimate interest the duty of exercising reasonable care under the circumstances of each case." 358 U.S. at 632.

The suggestion of petitioners that *Kermarec* abolished all jurisprudentially created standards of care which one class of persons may owe to another class of persons is simply not true. The Court was careful to point out that concepts of status and duty are very relevant in maritime law as well as common law. For example, the ship owner in *Kermarec* owed a higher duty to the ship's crew because of their status than was owed to the visiting plaintiff. The crew members were owed an absolute duty to a seaworthy vessel. 358 U.S. at 632. Although not stated in the *Kermarec* opinion, the ship owner also owed its crew members a nondelegable duty to provide a safe means of ingress and egress to and from the ship. *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679 (5th Cir., 1969); cert. den., 396 U.S. 1037, 90 S.Ct. 682, 24 L. Ed.2d 681 (1970); *Superior Oil Co. v. Trahan*, 322 F.2d 234, 235 (5th Cir., 1963).

Thus, variations in standards of care depending on status are well recognized in general maritime law. In their Joint Petition, petitioners cite the example of the barge inspector and a seaman both being killed on a ship's gangway. It is true that there are different duties which the ship owner owes to the barge inspector and the seaman. A much higher duty of care is owed to the seaman, i.e. a nondelegable duty to provide a seaworthy vessel and a safe gangway. To the barge inspector, the ship owner would only owe a duty of reasonable care under the circumstances. There are circumstances under which the barge inspector may not recover against the ship owner whereas the seaman, because of his status, could recover against the vessel owner. The same would be true for a longshoreman whose remedy under Section 905B of the Longshore Act would be a negligence action against the ship owner whereas the seaman's remedy lies under the Jones Act and the General Maritime Law Doctrine of Unseaworthiness.

The point which petitioner misses is that there are very often disparate results when multiple parties are injured in common accidents. For example, if an explosion at CITGO's refinery had been the cause of Mr. Authement's death, the recovery of every person injured in that explosion would be based upon that person's status vis a vis CITGO. Assuming CITGO's negligence in such an explosion, the survivors of Mr. Authement would recover from CITGO on a negligence theory whereas a dock worker employed by CITGO would be barred from recovery by virtue of the exclusivity provisions of the Longshore and Harbor Workers Compensation Act. Contractor employees who might have been injured or killed

in the accident could be treated differently depending upon the type of work being done by them at the time of the explosion. One contractor employee might be a borrowed servant of CITGO where as another contractor employee may have a cause of action against CITGO.

Another example of disparate treatment depending on status and duty owed can be found in the recent Fifth Circuit case of *Forrester v. Ocean Marine Indemnity Co.*, 11 F.3d 1213 (5th Cir., 1993). In that admiralty case, it was held that an oil company's status as a time charterer of a vessel imposed upon it no duty to passengers for the safe embarkation or disembarkation. Had the oil company been found to be a bareboat charterer, such a duty would have been owed to passengers.

The examples of disparate results cited above are by no means unique. There are endless rules of law, both maritime and common law which elevate or eliminate duty depending on status of the parties.

In the case at bar, even though it is unfortunate for the Authement survivors that they could not recover damages for loss of society [see *Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 498 U.S. 19, (1990)], on the other side of the coin, because of Mr. Authement's status as a seaman and the absolute duty of the vessel owner, the remedies available to the Authement survivors under the Jones Act and general maritime law against the ship owner caused Florida Fuels to agree to pay a lucrative settlement to the survivors R. 134-139. It would appear that the extraordinarily high degree of care owed by the Jones Act employer in this case precipitated the settlement.

Kermarec was significant in that it abolished the common law distinctions between licensee and invitee in the maritime context but it should not be interpreted as broadly as petitioners want in this case. This Court in *Kermarec* simply followed the trend of courts in many states by recognizing that the distinctions between licensees and invitees were outdated. Louisiana abolished such distinctions in 1976. *Cates v. Beauregard Electric Cooperative, Inc.*, 328 So.2d 367 (La. 1976). *Kermarec* allows courts to base distinctions in duty on the status of parties vis a vis each other. The lower court followed *Kermarec* by holding that dock owners do not have a duty to supply vessel crew members with gangways.

The duty of Florida Fuels to Mr. Authement arises from the doctrine of "seaworthiness." As the Fifth Circuit pointed out in its opinion in this case:

> "It is well settled, however, that the doctrine of 'seaworthiness' is not applicable to a dock owner who does not occupy the position of owner or operator of the vessel. *Daniels v. Florida Power & Light Co.*, 317 F.2d 41, 44 (5th Cir., 1963), cert. den., 375 U.S. 832, 84 S.Ct. 78, 11 L. Ed.2d 63 (1963); *Baker v. Raymond International, Inc.*, 656 F.2d 173, 181 (5th Cir., 1981), cert den., 456 U.S. 983, 102 S.Ct. 2256, 72 L.Ed. 2d 861 (1982)." 6 F.3d at 323

CITGO owed Mr. Authement a duty to exercise reasonable care by providing him with a dock which was reasonably safe. CITGO's duty did not extend to providing a gangway. That duty was owed by Florida Fuels

under its absolute duty to provide Mr. Authement with a seaworthy vessel.

CONCLUSION

Joint Petitioners have not set forth valid reasons why the Court should grant the Writ of Certiorari in accordance with Rule 10.1 of the Supreme Court Rules. The decision of the Fifth Circuit Court of Appeals does not conflict with *Kermarec* or any other decision of this Court.

This Court is respectfully urged to deny the Joint Petition for Writ of Certiorari.

Respectfully Submitted,

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